PRO SE APPELLANT:

AARON ISRAEL
Carlisle, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AARON ISRAEL,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 77A01-0802-CV-92
	)	
J. DAVID DONAHUE, RONDEL ANDERSON, EDWARD B. MOTLEY, JAMES WYNN, ALAN FINNAN, MAJOR BASINGER, N. WOODWARD, B. SMITH, J. HUSTON, J. BAKER, LEE HOEFLING, T. STEVENSON, J. WATKINS, J. GARDNER, AND LT. WRIN,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable P. J. Pierson, Judge
The Honorable Ann Smith Mischler, Magistrate
Cause No. 77C01-0711-MI-368

August 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Aaron (Isby) Israel, an inmate at the Wabash Valley Correctional Facility, appeals the trial court's dismissal of his complaint against numerous Indiana Department of Correction ("DOC") employees pursuant to the Frivolous Claim Law. Because Israel is challenging his assignment to the Secure Housing Unit and because enforcement of prison disciplinary sanctions are not subject to judicial review, Israel's claim is not a claim upon which relief may be granted. Accordingly, Israel's claim is dismissible under the Frivolous Claim Law. We therefore affirm the trial court.

Facts and Procedural History

On November 14, 2007, Israel,[1] an inmate at the Wabash Valley Correctional Facility ("WVCF"), filed a *pro se* complaint against J. David Donahue, then-Commissioner of the DOC, and DOC employees Rondel Anderson, Edward B. Motley, James Wynn, Alan Finnan, Major Basinger, N. Woodward, B. Smith, J. Huston, J. Baker, Lee Hoefling, T. Stevenson, J. Watkins, J. Gardner, and Lt. Wrin (collectively, "Defendants") in Sullivan Circuit Court. Specifically, Israel alleged that some of the Defendants "on October 23, 2006, for no reason at all, but, to retaliate against [him] for his being inclined to complain or litigate against or publicly expose abusive treatment and conditions, placed [him] in Supermax, known as the Secure Housing Unit ("SHU or SCU") or Special Confinement Unit for indefinite period." Appellant's App. p. 7. Israel

[1] In 1988, Israel, then known as Isby, was sentenced for aiding, inducing, or causing robbery, a Class A felony. *See Isby v. Finnan*, 02A04-0705-CR-292 (Ind. Ct. App. Oct. 29, 2007). Then, in 1992, Isby was convicted of two counts of Class A felony attempted murder and one count of misdemeanor battery for 1990 events including stabbing a prison guard with a knife while he was incarcerated at the Indiana Reformatory in Pendleton, Indiana. *See Isby v. State*, 48A02-0606-PC-463 (Ind. Ct. App. Dec. 29, 2006). Isby was sentenced to an aggregate term of forty and one-half years, to be served consecutive to the sentence he was then serving. *Id.*

detailed the conditions in the SHU, including twenty-three-hour confinement, that a light is on in his cell twenty-four hours a day, that he has no control over the temperature in his cell, that his cell is sparsely furnished, and that there is no window in his cell. He also complained about the restricted visitation, phone and mail privileges, social interaction with prisoners, and prison programming in the SHU.

On December 21, 2007, the trial court issued the following order:

> THE court now pursuant to I.C. 34-58-1-1, has examined Plaintiff's Complaint and has determined, pursuant to I.C. 34-58-1-2, that the claim may be frivolous in that it may not have an arguable basis in the law and may not state a claim upon which relief may be granted for the following reasons:
>
> 1. Plaintiff has failed to provide proof to the Court that he has exhausted his administrative remedies before filing this cause of action. Plaintiff must have complied with the grievance process as a prerequisite to filing a lawsuit for claims of constitutional violations. Further, the Plaintiff must have complied with the Indiana Tort Claims Act regarding any alleged personal injury complaints.
> 2. Further, the Court finds Plaintiff has failed to allege facts sufficient to prosecute this action against several of the Defendants named in his NOTICE OF CLAIM pursuant to I.C. 34-13-3-5(c).
> 3. Plaintiff has failed to provide the Court with adequate copies of his Complaint and Summons for the named Defendants.
> 4. Plaintiff has failed to pay the filing fee nor comply with I.C. 33-19-3-2 concerning waiver of the filing fee.
>
> Plaintiff has forty-five (45) days to show he has complied with the terms of this Order. If he cannot show compliance with the terms of this Order, this matter will be dismissed as a frivolous lawsuit pursuant to I.C. 34-58-1-1, et. seq.

Id. at 29.

On January 18, 2008, Israel filed a motion with the trial court in which he attempted to comply with the court's December 21, 2007, order. Specifically, he included the proper copies of the complaint and summons and a copy of his ledger

statement at the prison to show that he qualifies for a waiver of the filing fee. He also attached eight exhibits to the motion. The first four exhibits are copies of personal injury tort claim notices he filled out for incidents that occurred in the SHU. The last four exhibits are copies of four Formal Grievances he filed pursuant to the DOC's Offender Grievance Program and their respective dispositions.

On January 31, 2008, the trial court issued the following order:

> The Petitioner having filed pleadings with the Court in an attempt to comply with the Court's Order of December 21, 200[7], and the Court having reviewed the pleadings, now finds that the Petitioner failed to complete the five (5) step grievance process in that his documents only show completion through step two (2) of the grievance process. Exhausting administrative remedies is a prerequisite to filing this type of Complaint in state court. Further, the Petitioner failed to provide the Court with proof that his Notice of Tort Claims were actually mailed and served on the appropriate parties in compliance with the Indiana Tort Claims statutes.
>
> Based on the foregoing, this matter is dismissed pursuant to the screening process [Indiana Code § 34-58-1-2] and removed from the active docket.
>
> If Petitioner can show compliance with either of the above prerequisites to filing suit, his current Complaint is poorly pled. Assuming he can show compliance, the Petitioner would be advised to refile his pleadings separating the constitutional claims from the personal injury claims and making his pleading more coherent overall.

Id. at 87. Israel, *pro se*, now appeals. The Indiana Attorney General's office has filed a notice of non-involvement in this appeal.[2]

Discussion and Decision

Israel, *pro se*, contends that the trial court erred in dismissing his complaint. The trial court dismissed Israel's complaint pursuant to the Frivolous Claim Law. The relevant sections of this law follow. Indiana Code § 34-58-1-1 provides, "Upon receipt

[2] We hereby grant the Indiana Attorney General's Motion to Correct Record to reflect that the Attorney General is not representing Defendants on appeal.

of a complaint or petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter." This review occurs before the defendants even have an opportunity to become involved in the case and to file a responsive pleading or any other dispositive motion. *See Smith v. Huckins*, 850 N.E.2d 480, 483 (Ind. Ct. App. 2006). Section 2, in turn, provides:

> (a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:
>
> (1) is frivolous;
> (2) is not a claim upon which relief may be granted; or
> (3) seeks monetary relief from a defendant who is immune from liability for such relief.
>
> (b) A claim is frivolous under subsection (a)(1) if the claim:
>
> (1) is made primarily to harass a person; or
> (2) lacks an arguable basis either in:
> (A) law; or
> (B) fact.

Ind. Code § 34-58-1-2. If a court determines that a claim may not proceed under section 2, "the court shall enter an order: (1) explaining why the claim may not proceed; and (2) stating whether there are any remaining claims in the complaint or petition that may proceed." Ind. Code § 34-58-1-3 (formatting altered).

According to the trial court's January 31, 2008, order, it did not specify under which subsection of Indiana Code § 34-58-1-2(a) it dismissed Israel's complaint. In its earlier order, however, the court indicated that Israel's complaint was frivolous. When

reviewing the dismissal of an offender's claim, complaint, or petition pursuant to Indiana Code § 34-58-1-2, we employ a *de novo* standard of review. *Smith*, 850 N.E.2d at 484.

In Israel's six-page, single-spaced, typed complaint, he vigorously complains about life in the SHU, but a careful review of his complaint reveals that his real issue is with his placement there in the first instance. As quoted above, after setting forth his cause of action as "Cruel and Unusual Punishment," Israel writes that some of the Defendants "on October 23, 2006, for no reason at all, but, to retaliate against [him] for his being inclined to complain or litigate against or publicly expose abusive treatment and conditions, placed [him] in Supermax, known as the Secure Housing Unit ("SHU or SCU") or Special Confinement Unit for indefinite period." Appellant's App. p. 7. One of the final paragraphs of Israel's complaint provides:

> Aside from the severity of the conditions, plaintiff[']s] placement in the SHU is for an indefinite period of time, limited only by his term in prison. For a prisoner serving a life sentence or any sentence, there is no indication how long he may be incarcerated in the SHU once assigned there. Defendants Donahue, Anderson, Finnan, Motley, and Wynn[']s] criteria for placement in the SHU or Supermax is vague, subjective and discretionary, which res[ults] in haphazard and erroneous placement. Prisoners in the SHU are not eligible for parole while incarcerated there. These guidelines have allowed plaintiff to be placed in the SHU without "proving" any charge and for no reason at all. Defendants were only required to "document" an allegation. These guidelines failed to enumerate a standard for documenting an allegation. No notice or hearing consistent with the due process clause and procedural protection of the Constitution was ever provided to plaintiff by the defendants before he was assigned to the SHU. The indefinite term imposed on plaintiff in the SHU, coupled with the outmoded and inhumane conditions of extreme isolation, denial of privileges, additional regulations and restrictions on protected and discretionary activities, the denial of vocational, educational, employment, and rehabilitative opportunities, restrictions and denial of legal access and legal counsel, denial of human contact or socialization with other prisoners, family, friends, and other rigorous conditions at SHU, individually and in combination imposes on plaintiff an atypical and significant hardship as

> compare[d] with other Indiana prisons, which give rise to a protected liberty interest under the due process and cruel and unusual punishment clause, for plaintiff in avoiding assignment at SHU.

Id. at 10. It is apparent that Israel is complaining about his placement in the SHU on October 23, 2006, and its attendant restrictions on his social interactions with prisoners, visits with friends and family, mailing and telephone calls, and prison programming.

"It is now 'settled law' that 'enforcement of prison disciplinary sanctions are not subject to judicial review.'" *Higgason v. Ind. Dep't of Corr.*, 883 N.E.2d 812, 814 (Ind. 2008) (quoting *Israel v. Ind. Dep't of Corr.*, 868 N.E.2d 1123, 1124 (Ind. 2007) (Rucker, J., concurring) (citing *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 510 (Ind. 2005))); *see also Smith v. McKee*, 850 N.E.2d 471, 475 (Ind. Ct. App. 2006) (concluding that Smith's claims that he was taken to a "Special Management Cell" and "prevented . . . from receiving a visit . . . with a friend" and "unreasonably sanctioned to a year of disciplinary segregation" were properly dismissed in accordance with *Blanck*). Because Israel's assignment to the SHU, which undoubtedly has more restrictions than the general prison population, is a prison disciplinary sanction,[3] his claim is "not a claim upon which

[3] Israel filed a Level I Formal Grievance, Grievance Number 23248, pursuant to the DOC's Offender Grievance Program, in which he challenged his placement in the SHU on October 23, 2006, and alleged that he was experiencing social isolation and sensory deprivation. His Formal Grievance was denied as follows:

> Unit Team Manager K. Gilmore's Statement--On 10/23/2006, Isby was assigned to Departmental-Wide Administrative Segregation due to the assaults reflected in his conduct summary; which was considered detrimental to the safety and security of the facility. Segregation housing units provide living conditions that approximate those of the general inmate population; all exceptions are clearly documented. Segregation cells/rooms permit the inmates assigned to them to converse with and be observed by staff members. The amount of natural light that enters each unit and cell is in compliance with ACA Standards 4-4147 and 4-4148. Offenders assigned to administrative segregation have opportunities to interact with other offenders on the range and during programming. Furthermore, offenders assigned to administrative segregation may have televisions and radios in their cells and have the opportunity to engage in outside

relief may be granted." Therefore, Israel's complaint is dismissible under the Frivolous Claim Law.[4] *See Higgason*, 883 N.E.2d at 814 (citing Ind. Code § 34-58-1-2). We therefore affirm the trial court.

Affirmed.

MAY, J., and MATHIAS, J., concur.

> recreation for a minimum of one (1) hour seven days a week. Offenders assigned to administrative segregation have regular contact with Unit Management staff and custody staff. Furthermore, there is no restriction on sending or receiving mail and offenders may use the telephone every seven days. Offenders are permitted visits on Wednesdays and weekends/holidays and there are no restrictions on the offender's access to the courts/attorneys. Offender's [sic] assigned to administrative segregation have control of their own lights except for the 5 watt bulb that must burn 24-7 for the safety and security of all concerned. I am not sure where Isby gets the idea that this environment is one of social isolation and sensory deprivation. . . .
>
> G.S. Findings--The Unit Team Manager states that segregation housing units provide living conditions that approximate those of the general population, and all exceptions have been documented.

Appellant's App. p. 85. Israel's Level II Formal Appeal was also denied. *Id.* at 86.

[4] Because enforcement of prison disciplinary sanctions are not subject to judicial review, we do not address Israel's argument that the trial court erred in not granting his motion for change of judge.